
U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 98-022
ALJ CASE NO. 89-ERA-22
DATE: November 26, 1997

In the Matter of:

SHANNON T. DOYLE,
COMPLAINANT,

v.

HYDRO NUCLEAR SERVICES,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

REMAND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851 (1988).[1] Complainant, Shannon Doyle, has asked the Board to remand the complaint to the Administrative Law Judge (ALJ) for further proceedings to resolve the calculation of back pay. Respondent, Hydro Nuclear Services (Hydro), asks that we clarify an earlier order prior to remanding the complaint. We clarify certain issues and remand the complaint to the ALJ with further instructions on the calculation of the back pay.

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PROCEDURAL HISTORY

In a 1994 decision, the Secretary found that Hydro violated the ERA when it refused to hire Doyle as a decontamination technician under a contract to provide such technicians to the D.C. Cook nuclear power plant in Illinois. The Secretary ordered Hydro to reinstate Doyle and to pay back pay. In a later order, the Secretary remanded the case to an

Administrative Law Judge (ALJ) for a hearing and a recommended decision on the amount of damages. Sept. 7, 1994 Decision and Order of Remand.

On remand, the ALJ found that Doyle was entitled to certain affirmative action to abate the violation, to $40,000 in compensatory damages, to back pay with interest, and to five years of front pay. The Board determined that Doyle's back pay would be calculated at six months' work per year, at 40 hours per week straight time and 32 hours per week overtime, and would not include a per diem payment. Sept. 6, 1996 Final Decision and Order (1996 ARB Dec.) at 4-6.[2] The Board indicated that the back pay would end with the issuance of the final judgment in this case. *Id.* at 4.

The Board stated that Doyle's back pay is to be calculated "according to the average hourly amount earned by decontamination technicians in the nationwide nuclear industry in each year since 1988." 1996 ARB Dec. at 6. The record did not, however, contain those figures. The Board preferred that the parties agree on the average hourly wages:

> In the interest of finality in this long pending case, we encourage the parties to agree on the average hourly wage for the years since 1988. If the parties cannot agree, they shall notify the Board, which will determine whether it is necessary to remand the case to the ALJ for a determination of the exact amount of back pay owed.

Id. at 6 n.6.

The Board noted that to calculate the front pay, it must determine the present value of two income streams: Doyle's pay as a decontamination technician and the $2500 in anticipated wages from alternate employment. 1996 ARB Dec. at 8. The Board "encouarage[d] the parties to agree to the average hourly wage, appropriate discount rate, and the resulting front pay award." *Id.*

THE MOTIONS

Since the parties were unable to reach agreement on both the average hourly wage rate and on a discount rate for determining present value, Doyle asked us to remand the

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complaint for further proceedings before an ALJ. Doyle states that discovery is necessary to determine the average hourly wage rate for nonlocal decontamination technicians for the years 1988 - 1997.

In response, Hydro moved that the Board clarify certain aspects of its September 1996 decision and, upon such clarification, it agrees that the matter should be remanded to the ALJ to determine the applicable pay rate and discount rate. Hydro asked clarification that the "final judgment" that ends the back pay period is the Board's September 1996 decision. Doyle opposed Hydro's motion for clarification.

DISCUSSION

As Hydro points out, Respondent's Reply to Complainant's Opposition at 2-3, under Title VII and other antidiscrimination statutes, the back pay period usually ends, and the front pay period begins, at the close of the trial or at the time of the court's judgment. *See Blum v. Witco Chem. Corp*., 829 F.2d 367, 373 (3d Cir. 1987) (back pay ends at time of trial); *Berndt v. Kaiser Aluminum & Chem. Sales, Inc*., 604 F. Supp. 962, 964 (E.D. Pa. 1985), *aff'd*, 789 F.2d 253 (3d Cir. 1986) (same). There are cases in which, because of special circumstances, back pay ends and front pay begins at a time other than the end of trial or the issuance of judgment. For example, in a case arising under the analogous whistleblower provision of the Surface Transportation Assistance Act of 1982, *Michaud v. BSP Transport, Inc*., Case No. 95-STA-29, ARB Final Dec. and Ord., Oct. 9, 1997, slip op. at 6, we found that the back pay period ended and the front pay period began prior to the hearing, at the time the respondent made a *bona fide* offer of reinstatement to the complainant.

Additional discussion of the *Michaud* decision is instructive in calculating front pay in this case. In *Michaud*, we found that the unlawful discharge caused the complainant to suffer from major depression, with the result that declination of the reinstatement offer was reasonable and did not cut off entitlement to back or front pay. At the time of the hearing, the complainant had undergone psychotherapy for some eight months, slip op. at 3, and his therapist opined that additional therapy was needed to rehabilitate him so that he could work in a new occupation. Slip op. at 4. In *Michaud*, since the needed therapy already was underway at the time of the hearing, we determined that the two year rehabilitation period began at the close of the hearing. Slip op. at 7.

In this case, we previously found, based upon projections in the record, that it would take five years of rehabilitation to make Doyle employable in a new position:[3]

> The evidence indicates that Doyle is not likely to find permanent employment in the next five years. Psychologist Stephen Carter opined that Hydro's actions

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> adversely affected Doyle's employability by making him anxious and uncomfortable around supervisors and unable to stay employed for long periods. T. 54 - 56, 70. The psychologist concluded that there was a "very, very, very low" probability of Doyle succeeding in any employment. T. 71. To make Doyle employable again, Dr. Carter recommended that he receive psychotherapy for a period of four to five years, T. 58, as well as education of training to help him enter a new employment field. T. 59. Since the evidence shows that it will take about five years to make Doyle employable again, we affirm the award of five years of front pay.

1996 ARB Dec. at 8. At the time of the hearing in 1994, Doyle had not yet begun the therapy and either education or training necessary to make him employable again. In a pleading filed some 34 months after the hearing, Doyle states:

> [Doyle] has not obtained any of the compensatory damage award which he needs in order to obtain the counseling and education necessary to reenter the job market in a position which would have made him properly whole. Mr. Doyle continues to live in poverty, denied the compensation necessary to overcome the impact of Respondent's discriminatory conduct.

Complainant's Opposition to Respondent's Motion for Clarification at 4-5.

To the extent that Hydro's failure to pay the monetary damages awarded by this Board effectively prevented Doyle from obtaining the necessary therapy and training, it would not be appropriate for the five year front pay period to commence prior to the time that the award was enforceable against Hydro. Respondent should not receive the benefit of the front pay period already having begun if Respondent's failure to pay damages has precluded Doyle's rehabilitation.[4]

We will not speculate in the absence of record evidence (as opposed to counsel's arguments) concerning the state of Doyle's rehabilitation. On remand, the ALJ shall take evidence on, and make findings, concerning whether Doyle has obtained any of the necessary therapy and education, and if not, whether he lacked the funds necessary to get therapy and the needed education or training. If the ALJ so finds, the back pay period will end, and the front pay period will begin, upon the issuance of a final, judicially reviewable Board decision.[5] On the other hand, if the ALJ finds that Doyle has begun to obtain therapy and education/training, or that he had the financial means to do so but did not, we find that the back pay period ended and the front pay period began upon the issuance of the Board's earlier decision on September 6, 1996.

On remand, the ALJ also shall take evidence on, and make findings of, the "average hourly wage amount earned by decontamination technicians in the nationwide nuclear industry in each year since 1988." 1996 ARB Dec. at 6. After making such

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findings, the ALJ shall calculate the back pay award. We reiterate that for the year 1988, the wage rate to be applied is $6.50 per hour straight time and $9.75 per hour overtime. 1996 ARB Dec. at 6. The average hourly wage rates that the ALJ determines for the years since 1988 shall be multiplied by 1.5 to derive the overtime hourly rate in those years. *Id.* For all years, back pay shall represent six months of work and work weeks shall comprise 40 hours of straight pay and 32 hours of overtime pay. *Id.*

The September 1996 decision left open an additional issue on which the parties were unable to agree: the appropriate discount rate to be used to find the present value of two income streams involved in calculating Doyle's front pay. On remand, the ALJ shall take evidence on, and make a recommendation concerning, the appropriate discount rate and shall calculate the amount of front pay to be awarded to Doyle according to the instructions in the 1996 decision.[6]

We note that Doyle has incurred additional attorney fees and costs in seeking this remand, and will incur even more fees and costs during the proceedings on remand and in briefs to be filed before this Board when it considers the forthcoming supplemental recommended decision of the ALJ. We shall award such additional fees and costs as necessary in the bringing of this complaint. We authorize Doyle to present a petition for such costs to the ALJ and authorize Hydro to respond to any such petition. We ask the ALJ to make a recommendation of the additional fees and costs to which Doyle is entitled.

CONCLUSION

Doyle's motion for remand is **GRANTED** and this case is **REMANDED** to the ALJ for further proceedings consistent with this Order. Hydro's motion for reconsideration is **GRANTED** to the extent that we have provided further guidance to the ALJ for use in determining the cut off date for back pay, which is the commencement date for the front pay calculation.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[ENDNOTES]

[1] The 1992 amendments to the ERA do not apply to this case because the complaint was filed prior to 1992.

[2] Doyle was hired to work during an outage, or period of shutdown of the nuclear unit. He would have worked at the D.C. Cook plant as a "nonlocal" decontamination technician, and would have received a *per diem* payment to cover the cost of housing and food.

[3] It was not possible to order Respondent to hire Doyle because Hydro's successor "no longer employs decontamination technicians and does not have any positions for which Doyle qualifies." Consequently we ordered front pay in lieu of reinstatement. 1996 ARB Dec. at 7.

[4] There is no dispute concerning the calculation of the compensatory damages awarded in the 1996 decision.

[5] We find support for this position in *Suggs v. Servicemaster Educ. Food Mgmt*., 72 F.3d 1228, 1231 (6th Cir. 1996), in which the District Court found that the plaintiff's discharge violated Title VII of the Civil Rights Act of 1964, ordered back pay until the conclusion of the trial, reinstatement, and also a "additional back pay from the conclusion of the trial through the effective date of an offer of reinstatement." The Sixth Circuit recognized that the "additional back pay" actually was front pay, and that it was improper to order both front pay and reinstatement. Accordingly, the Sixth Circuit remanded the award of "additional back pay" to the District Court for clarification, 72 F.3d at 1234, and stated that "[i]nasmuch as the district court's award of back pay was appropriate . . . and [the defendant] did not obtain a stay of the court's order to reinstate [the plaintiff], the award of back pay can continue to run through the date of the district court's additional findings [on remand], less what [the plaintiff] has earned in substitute employment since the end of trial." 72 F.3d at 1235.

[6] If the ALJ determines that the back pay cutoff was September 6, 1996, he ALJ shall not apply a discount rate to front pay for the period after September 6, 1996 and prior to the issuance of the ALJ's supplemental recommended decision and order on back pay and front pay.